No. 15195

IN THE

United States Court of Appeals

for the Ninth Circuit

JAMES HANNIFIN, Claimant of One Electronic Pointmaker, Also Known as the JOKER MACHINE, Serial Number X550378,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee;

and

JAMES HANNIFIN, Claimant of One Electronic Pointmaker, Also Known as the BINGO MACHINE, Serial Number X550518,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Appeals from the United States District Court for the District of Montana, Butte Division.

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305 Barber-Lydiard Building,
Great Falls, Montana;

EDWIN V. MAGAGNA
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STATUTES AND CASES CITED

STATEMENT OF THE CASE

This is an appeal from two identical Decrees of Condemnation made and entered in the United States District Court for the District of Montana, Butte Division on the 6th day of April, 1956. The Hon. W. D. Murray was the presiding Judge.

A Libel of Information was filed against one Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, on the 6th day of December, 1955, and a similar Libel of Information was filed against one Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518. Thereafter, on the 5th day of January, 1956, James Hannifin intervened and filed his claims to both machines. The cases were consolidated for trial and it was stipulated that the two cases could be tried together, and the evidence adduced as to one Electronic Pointmaker be applied to the other. The cases were tried before the Court without a jury on January 12, 1956, and the Court made its findings of fact and conclusions of law and entered an identical Judgment and Decree of Condemnation in both cases on April 6, 1956, from which the claimant, James Hannifin, makes this present appeal.

The amended Libel of Information states:

"1. That the amended libel of information is filed by the United States of America and prays the seizure and forfeiture of a certain gambling device, as hereinafter set forth, in accordance with the Transportation of Gambling Devices Act. (15 U. S. C., Section 1171, et seq.)."

The question at issue is whether or not the two machines in question are subject to seizure and forfeiture under the provisions of said statutes.

POINTS RELIED UPON ON APPEAL

I. The Court erred in holding and deciding that said Electronic Pointmakers were and are gambling devices within the meaning of Title 15 U. S. C., Section 1171.

II. The Court erred in not strictly construing the Transportation of Gambling Devices Act (Title 15 U. S. C., Section 1171, et seq.), commonly known as the Johnson Act, in view of the fact that said Act is penal in character.

III. The Court erred in holding and deciding that the said Electronic Pointmakers had drums or reels, with insigna thereon as an essential part of said machines.

IV. The Court erred in holding and deciding that said machines were transported in violotion of Title 15, U. S. C., Section 1172.

V. The Court erred in reserving a ruling on claimant's objection to the introduction of evidence tending to show libelee machines were used for gambling purposes and not sustaining said objection when made. (Record Page 55).

VI. The Court erred in denying claimant's motion to dismiss at the conclusion of the libelant's case.

VII. The Court erred in not finding that said machines are not gambling devises per se.

VIII. The Court erred in not finding that there was no "direct payoff" from the machines.

IX. The Court erred in not finding that the machines, the libelees herein, can be used for amusement and recreational purposes.

X. The Court erred in not finding that no coin can be inserted in the machines, libelees herein ,to operate the machines.

XI. The Court erred in not finding that the counter device, or totalizer, was not an essential part of the machines, in the intent of Congress in passing the "Johnson Act", and have nothing to do with the operation of the machine, but merely record the score.

XII. The Court erred in not dismissing the amended libel of information as not being within the prohibitive scope of the Johnson Act.

ARGUMENT

I. EVIDENCE

The evidence in this case can be briefly summarized as follows:

First Witness Kent Hutcheson, called on behalf of libelant, (Record Page 43), Special Agent, F.B.I., identified machines, testified as to their seizure and that he had seen persons play the machines.

Second Witness Hubert J. Massman, called on behalf of libelant, (Record Page 51), Assistant Attorney General, State of Montana, testified that he had observed machines of similar type in a number of public places being played, and that they were used for gam-

bling. That at the time of his investigation he was in the employ of and acting for the Attorney General of the State of Montana.

Third Witness Ole Nelson, called on behalf of libelant, (Cecord Page 60), bartender at Eagle's Lounge, Butte, Montana. Testified that machines in question were at Eagle's Lounge and were played by patrons. That patrons paid five (5) cents per play, and if player had any games left he was paid a nickel for each one. That most of the time player played what he had coming.

Fourth Witness Glen Tarbox, called on behalf of libelant, (Record Page 63), of Missoula, Montana, a part owner of a radio and television repair shop. Testified that he had experience with working mechanism of slot machines, pinball machines, and automatic phonographs, between years 1937 to 1952. Testified that there was some similarity between slot machines and machines in question. Upon cross examination that there were many differences between slot machines and machines in question, and at Record Page 72, testified as follows in regard to the counter device, and reels and drums:

"Q. In that connection with the slot machines you have worked on, did any of them have a counter device similar to this one?

A. No.

Q. That counter device has not been used in slot machines?

A. I have never seen one.

Q. Now, with reference to these plates here that

turn around, are there any markings or insignia on those?

A. I didn't see any.

Q. Now, what markings or insignia were thereon the reels or drums used in the slot machines?

A. You mean on the face of the drum, you mean?

Q. On the reels and drums of the slot machines, what insignia did you find on that type machine?

A. They varied, they had fruit symbols and bells.

Q. With reference thereon to the reels or drums you saw in slot machines that had insignia thereon ,are there any of that type of reels or drums in this assembly?

A. The large drums in the slot machine? No, there are not."

He also testified that the machines could be played without the counter device or totalizer. That the counter device had nothing to do with the operation of the machine but merely kept track of the plays. (Record Pages 73, 74, 75)

(Testimony of Glen Tarbox)

"Q. Actually, what does the counter do, insofar as the machine is concerned, what does it purport to do, or what does it actually, physically do?

A. It gives the person playing the machine a record of how many free plays he has.

Q. It is a recorder or counter?

A. Right.

Q. That counter doesn't determine how many free plays he gets or what his score is, it merely counts how many times it has been played, and then records if the device gives him back some plays, and records how many it gives back?

A. Right."

Also testified that similar counter devices were used on pinball games, bowling games, electric phonographs.

He also stated in answer to Court's questions, Record Page 77, that the reel or drum that was commonly called the reel or drum of the slot machine, was the reel or drum that revolved, had insignia on it, and then came to a stop.

He also testified that there are no slots for insertion of coin in machines in question ,or any slots for pay out of coins, and that they did not contain any mechanism that could be used for this purpose.

Fifth Witness James J. Hannifin, called in behalf of claimant (Record Page 86), testified that he was the owner of the machines in question.

Sixth Witness Bernard T. McManus, called in behalf of claimant, (Record Page 88), Testified that he designed the machines in question. That the idea was first conceived in fall of 1949, and made application for letters patent in spring of 1950, and patent was issued in 1951.

That it was designed and patent applied for before enactment of the Johnson Act, and was not designed for the purpose of evading the terms of the Johnson Act.

That in the Wyoming case there were introduced two machines, one referred to as "Exhibit A" which had reels and drums with insignia thereon that the slot machines were using at the time, and one referred

to as "Exhibit B" which was similar to governments "Exhibit 1" in the present case.

Testified that the counting device on present machines were not used on slot machines, they are purchased on the market, are used on many other machines, have nothing to do with the operation of the machines other than recording the score, and machine could be operated without the counting devices.

Testified that there were no slots for insertion of coins in machines in question, or any slots for pay out of coins, and that they did not contain any mechanism that could be used for this purpose.

Testified that the machines did not have any reels or drums with insignia thereon similar to those used in slot machines.

It should also be noted that the machines, government Exhibits 1 and 1-A and 2 and 2-A were offered and received in evidence and it was agreed that the two cases could be tried together and the evidence adducted as to one electronic pointmaker could be applied to the other.

There was no rebuttal evidence offered by the government, however the government requested the Court to take judicial notice of the Report of the House of Representatives, No. 2769, in the 81st Congress, and the report of the Senate, No. 1482, 81st Congress, and of unreported decision in the Case of U. S. vs. One Joker Type Slot Machine, Third Division, Territory of Alaska.

II. STATUTES TO BE CONSIDERED

The statutes herein involved are designated as the Transportation of Gambling Devices Act. (15 U. S. C., Section 1171, et seq.). Section 1171, U. S. C. Title 15, so far as is here material, reads as follows:

"Definitions

As used in this chapter—

(a) The term "gambling device" means—

(1) Any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; . . ."

Subsection (2) of the same section refers to coin-operated machines.

Subsection (3) refers to any subassembly or essential part intended to be used in connection with such machine or mechanical device.

Section 1172, U.S.C., Title 15 makes unlawful the transportation of any such gambling device interstate, with certain exceptions not material herein.

Section 1173, U.S.C., Title 15, provides for the registration of manufacturers and dealers of gambling devices.

Section 1174, U.S.C., Title 15, provides for the labeling and marking of shipping packages containing gambling devices.

Section 1175, U.S.C., Title 15, prohibits manufacturing, repairing, selling, possessing, etc. of gambling devices within the "Indian Country" as defined in Section 1151, U.S.C., Title 18, or "within the special maritime and territorial jurisdiction of the United States" as defined in Section 7 U.S.C., Title 18.

Section 1176, U.S.C., Title 15, provides the penalties for violation of the aforementioned sections, to-wit: $5,000.00 fine or imprisonment not more than two years, or both.

Section 1177, U.S.C., Title 15, provides for confiscation of gambling devices as defined by Section 1171, and forefeiture. The material part of this section, in so far as the present case is concerned is the first sentence:

> "Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this chapter shall be seized and forfeited to the United States."

III. LEGISLATIVE HISTORY

The Transportation of Gambling Devices Act, Title 15, U.S.C., Section 1171, et seq., was enacted January 2, 1951.

The bill was introduced as Senate File 3357 by Senator Johnson of Colorado. It was reported out

by Committee, Senate Report No. 1482, a copy of which has been furnished the Court, passed the Senate and referred to the House. The House of Representatives Committee recommended certain amendments, as set forth in House Report No. 2769, a copy of which has been furnished the Court. The Bill was passed by the House as amended. It subsequently went to conference and the conference report was agreed to by Senate. (Congressional Record Senate Pages 16,865 to 16,903.)

The bill was drafted and enacted to prohibit the interstate shipment of Slot Machines.

An examination of these reports and the Congressional Record indicate that the Committees and members of Congress had difficulty in arriving at the definition of "Gambling Device".

The problem is set forth at last paragraph of page 6 of Senate Report No. 1482, in a letter to Senator Johnson calling his attention to the fact that the definition in Senate version was too broad;

> "For example, an ordinary bowling alley could conceivably come within the definition of a gambling device since there is an element of chance involved and the user or player may become entitled to receive something of value. In fact, many bowling alleys do offer prizes and, thus, could conceivably be prohibited from shipment in interstate commerce if S. 3357 would become law. Obviously it was not the intent to include this sports-amusement game.
>
> "There is no game known to man which does not have an element of chance, and, further, the player of any game could conceivably become entitled to

receive something of value if anyone wishes to offer a prize."

The House Committee Amendments are set forth at page 6 of Report No. 2769. The one as to definition being as follows:

"COMMITTEE AMENDMENTS

"Section 1 defines gambling devices. As defined in the bill passed by the Senate, 'Gambling device' means:

> Any machine or mechanical device or parts thereof, designed or adapted for gambling or any use by which the user as a result of the application of any element of chance may become entitled to receive, directly or indirectly, anything of value.

"In their testimony before your committee, representatives of the Attorney General stated that this definition could possibly be construed to include pinball machines and similar devices which are played purely for amusement and which do not have pay-off devices which return to the player anything of value. In his communication, addressed to the chairman of your committee, dated June 1, 1950, the Attorney General's representative pointed out, however, that it was the intention of the Department of Justice that machines manufactured and used purely for amusement should be excluded from the provisions of this bill.

"In view of this testimony and because of its intention to exclude pinball machines and similar amusement machines as well as certain machines and devices commonly used, for instance, at carnivals and livestock shows, your committee decided to adopt a definition of gambling device different from the one contained in the Senate bill. Gambling device is defined by the committee amendment as:

(1) Any so-called "slot machine' or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive as the result of the application of an element of chance, any money or property; or

(3) Any subassembly or essential part intended to be used in connection with any such machine or mechanical device."

The bill was discussed by the Senate at the time the conference report was being considered. This appears in Congressional Record Senate, pages 16,685 to 16,903. We like to call the Court's attention to several portions of the discussion, between Senator Johnson the sponsor of the bill, and others. Senator Taft and Sen. Johnson, Page 16,901, Column 2:

"MR. TAFT. I am not so much concerned with slot machines as I am with pari-mutuel machines.

"MR. JOHNSON of Colorado. The bill does not touch any other machines. It does not touch pari-mutuel machines. The language in the House bill is narrower.

"MR. TAFT. This is the language to which I was referring:

(1) Any so-called slot machine or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, *** (B) by the operation of which a person may become entitled to receive, as the result of the aplication of an element of chance, any money or property.

"There is nothing in that language which refers to any coins. Subsection (1) (A) speaks of coins. Subsection (1) (B) does not refer to coins. It would seem to me, therefore, that a pari-mutuel machine might be fairly considered to be operated with a drum or reel. The bill would cover roulette machines, and it might be broad enough to include pari-mutuel machines. I do not know anything about pari-mutuel racing machines. Some persons in my State who are interested in pari-mutual racing seem to have become quite concerned about the bill.

"MR. JOHNSON of Colorado. Pari-mutuel machines do not use any drum or mechanical devices like those used in slot machines.

"MR. TAFT. It must be some sort of machine."

Senator Holland and Senator Johnson, Page 16,902, Column 2:

"(MR. HOLLAND) . . . . I wish to be very sure that that language does not permit the application of the bill to be a totalizer used in a pari-mutuel racing, which is nothing in the world but a complex computing machine or device. The question which the Senator from Florida wishes to address to the Senator from Colorado at this time is this:

It is not true that subdivision (B) in section 1 of the conference bill cannot in any situation apply to a totalizer because of the fact that subdivision (B) includes, as a necessary element, that provision stated in the words 'as the result of the application of an element of chance,' whereas in the use and operation of a totalizer there is and can be no element of chance whatever, the machine being purely a computing machines, which, using the figures and facts which are committed to it, delivers as a result of its computation, fixed and certain results, and their being no element of chance whatever entering into the operation of the computing

machine which is referred to generally as a totalizer?

"MR. JOHNSON of Colorado. Mr. President, the Senator from Florida has stated the case very clearly. The bill does not affect in any way any adding machine or any computing machine of any description or kind. It cannot do so. The sentence which begins with '(B)' or line 20 is part of the whole sentence and is controlled by the language preceding it. There is nothing in the conference reports which in any way effects in the slightest degree any of the paraphernalia used in pari-mutuel seems to me that the description which is given in the bill is clear, and that it is clear that it applies only to slot machines."

". . . . . .

"MR. JOHNSON of Colorado. The Senator is correct. The bill would not in any way affect any machine, or any part of a machine, used for calculating purposes. I say again that the bill would not in any way affect any paraphernalia used in pari-mutuel betting—either repairs, parts, or old machines."

IV. APPLICATION OF STATUTES TO LIBELLEES

The Amended Libel of Information, paragraph 3, reads as follows:

"3. That said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, was transported in violation of 15 U.S. C., Section 1172, in that said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, was a gambling device within the meaning of 15 U.S.C., Section 1171, **in that it was a machine and mechanical devise, an essential part of which is a drum or reel, with insignia thereon,** by the operation of which a person may become entitled to receive, as

the result of the application of an element of chance, money and property, when said gambling device was transported to Butte, Montana, from Chicago, Illinois, as aforesaid."

In order for a non-coin operated machine to be within the prohibitive scope of the statute it must contain:

(1) A drum or reel with insignia thereon, as contemplated by Congress; and

(2) Which are an essential part of the machine within the meaning of the statute.

As to item (1), an examination of the legislative history definitely indicates that Congress was talking about the:

Drums or reels with insignia thereon which were used on slot machines.

It should be noted that Glen Tarbox, called as the expert witness of libelant, specifically testified, (Record Page 72) that the counter device used in machines in question has not been used in slot machines, and that there were no drums or reels with insignia thereon, on these machines of the type found on slot machines.

We have checked Webster's New International Dictionary of the English Language, Second Edition—Unabridged 1955, for the definitions of the words used. The applicable definitions as we read them are as follows:

"**Drum**—Page 791-792, 4 G)—A revolving cylinder or barrel, whether hollow or solid, that acts, or is acted upon by something exterior to itself."

"**Reel**—(Page 2090-2091, -1—A revolving device . . . . it is usually a frame consisting of a horizontal axle with spokes radiating from a hub near each end, and horizontal bars or slots connecting these in pairs."

"**Insignia**—1. Distinguishing marks of authority, office or honor, badges, emblems; as the insignia of royalty or an order. 2. Typical and characteristic marks or signs by which anything is distinguished; as the insignis of a trade."

It is interesting to note that under the definition insignia that no mention is made of numbers or numerals.

The statute being of a penal character it should be strictly construed in favor of the libelee.

The following cases in regard to the foregoing statute (Johnson Act) specifically set forth that the statute is highly penal in character and should be strictly construed:

In the case of **Smith vs. McGrath, Attorney General —103 Fed. Supp. 286, District of Maryland,** the Court states at page 288:

"There are two well known elementary rules of construction that are applicable here. One is that words used in the statute are to be understood in their ordinary meaning and acceptation unless the context of the act as a whole reasonably is highly penal in character and therefore should be strictly construed."

In the case of **U. S. vs. 139 Gambling Devices, alias slot machines, 109 Fed. Supp. 23, East District, Illinois,** the Court states at page 26:

"Forfeitures are not favored and they should be enforced only when within both the letter and spirit

of the law. United States v. One 1936 Model Ford Coach, 307 U.S. 219, 226, 59 S.Ct. 861, 83 L.Ed. 1249. Forfeiture statutes should be strictly construed. C. C. Co. v. United States, 5 Cir., 147 F.2d 820; The Leme, 77 F.Supp. 773, 777."

In the case of **U.S. vs. 5 Gambling Devices, 119 Fed. Supp. 641, North District, Georgia,** the Court says at page 644:

"The Act of January 2, 1951, Title 15, US CA-S-1171, et seq. prohibiting the transportation of gambling devices in interstate commerce, was passed pursuant to the Constitutional power of Congress to regulate interstate commerce, and being penal in character must be strictly construed."

In case of **U.S. vs. 7 Slot Machines, 119 Fed. Supp. 713, North District, Georgia,** the Court set forth the same statement as contained in case of U.S. vs. 5 Gambling Devices, Supra.

As to item (2) the word **essential,** as used in this statute must be construed to mean that the drum or reel be more than just a part of the machine and must be actually necessary to the operation of the machine, otherwise the statute would have the same meaning without the use of the word **"essential".**

In the case of **Washington Market Co. v. Hoffman 101 U.S. 112,** the Court states the rule as follows:

"It is a cardinal rule of statutory construction that significance and effect shall if possible, be accorded to every word. As early as in Bacon's Abridgement, Section 2, it was said that 'A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word, shall be superfluous ,void, or insignificant'. This rule has been repeated innumerable times. Another

rule equally recognized is, that every statute must be construed with the whole, so as to make all parts harmonize ,if possible, and give meaning to each."

In case of **Alder, et al. vs. Northern Hotel 175 Fed. 2nd 619,** is to the same affect:

"In construing the language of Section 205, we commence with the rule that the courts are not at liberty to construe any statute so as to deny effect to any part of its language. 'It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word * * * Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all parts harmonize, if possible, and giving meaning to each.' Market Co. v. Hoofman 101 U.S.—112, 115, 116, 25 L. Ed, 782, and Ex. Parte National Bank, 278 U.S., 101, 104, 49 S. ct. 43, 73 L. Ed. 203. That is to say, every word used is presumed to have meaning and purpose, for Congress is not to be thought by the courts to have used language idly.

We checked Webster's New International Dictionary of the English Language, Second Addition—Unabridged 1955, and the applicable definition as we read it is as follows:

"**Essential** — (Page 874) 2. Of or pertaining to essence, or the essence of something, belonging to, or relating to, the inner or constituent character of anything, as, an essential right or part. 3. Important, in the highest degree, indispensable."

We find the following definition in Words & Phrases, Volume 15, Permanent Edition, Page 245:

" 'Essential' means indispensably necessary, important in the highest degree, requisite. Pittsburg Iron & Steel Foundries Company vs. Seaman-Sleeth Company, D. C. Pa. 236 F. 756, 757. Reddell vs.

Penn R. Co., 106A 80, 81, 262. Pa. 582. 'Essential' as indispensable' ".

It should also be noted in this regard that Glen Tarbox, called as the expert witness of libelant, testified (Record Pages 73, 74, 75) that the machines could be played without the counter device or totalizer, that the counter device had nothing to do with the operation of the machine but merely kept track of the plays.

In the recent case of **U.S. vs. Walter Korpan, rendered In The United States Court of Appeals for the Seventh Circuit, September 28, 1956, No. 11669,** the Court in construing a statute relative to taxation of coin operated gaming devices the Court states:

"If the dictionary definition of 'slot machine' were applied, it is clear that these machines would be covered by the definition of coin-operated gaming device.

"A machine the operation of which is started by dropping a coin in a slot." Webster's New International Unabridged Dictionary, 2d Ed. 1955.

When this definition is considered with the choice of, language employed by Congress i.e., "so-called 'slot' machine which operates by means of the insertion of a coin, token or similar object ***," it would appear that Congress intended a more restrictive meaning for the term "slot machine".

The term "so-called" is a modifying word implying doubt as to the correctness or propriety of so designating a thing. See Webster's New International Unabridged Dictionary, 2d Ed. 1955. And the use of quotation marks to set off the word "slot" indicates that Congress did not intend the language "so-called 'slot' machine" to be as com-

prehensive as the dictionary definition of "slot machine." Every word used in a statute is presumed to have a meaning and purpose, and, if possible, every word must be accorded significance and effect. **Washington Market Co. v. Hoffman, 101 U. S. 112; Alder v. Northern Hotel Co., 7 Cir., 175 F. 2d 619.** We conclude, therefore, that not only must these machines incorporate the three incidents noted above, but they must also be "so-called" 'slot' machines."

Since the term "so-called 'slot' machine" is not adequately defined in Section 4462 nor elsewhere in the Internal Revenue Code, it becomes necessary to resort to extrinsic evidence in order to accord meaning and purpose to this language.

The defendant in urging this point suggests that the term "slot machine" as used in Section 4462 refers specifically to a machine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit (colloquially called a "one-armed bandit").

There is force to this conclusion when the language thus employed is reviewed in light of the legislative history of Section 4462.

Before reviewing the legislative history of this statute it would be well to consider the argument advanced by the Government that the statute is clear and unambiguous, and that consequently there is no necessity for looking behind the words of the statute in order to determine what the intent of Congress was. We do not believe, however, that these words are sufficient in and of themselves to determine the purpose of the legislation. In such an event "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." United States v. Ameri-

can Trucking Associations, Inc., 310 U.S. 534 at pages 543-44."

The Court in the case of U. S. vs. Walter Korpan, supra, makes specific reference to the statute involved in the case at issue and states:

"Statutes which relate to the same thing or same class of things are often helpful in construing a particular satute. See Great Northern Ry. v. United States, 315 U.S. 262.

The Johnson Act, passed on January 2, 1951, prohibits the interstate shipment of gambling devices which it defines as follows:

"(1) any so-called 'slot machine' or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon and (A) which when operated may deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

"(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property * * *." 15 U.S.C.A. Sec. 1171.

If this definition were applied to the machines here involved it is clear that they are without its scope. A drum or reel with insignia thereon is not an essential part of defendant's machines, nor are these machines designed and manufactured so that when operated they may deliver any money or property."

It should be noted that the machines in the Korpan

case contained a counter device or totalizer of similar type to that on the machines in the case at bar, and in addition were operated by insertion of a coin, but the Court specifically ruled that they were without the scope of the Johnson Act because:

> "If this definition were applied to the machines here involved it is clear that they are without its scope. **A drum or reel with insignia thereon is not an essential part of defendant's machines,** nor are these machines designed and manufactured so that when operated they may deliver any money or property."

V. CONCLUSION

The machines in question are not as set forth in paragraph 3 of the Amended Libel of Information, a gambling device within the meaning of 15 U.S.C. Section 1171, in that they are not machines, or mechanical devices, an essential part of which is a drum or reel for the following reasons:

1. The machines do not contain drums or reels with insignia thereon;
2. The counter device or totalizer on the machine claimed by the libelant to be drums or reels:

(A) Are not drums or reels according to the ordinary use of words.

(B) Are not drums or reels as contemplated by Congress at the time of the passage of the act.

(C) Are not an essential part of the machines in that they have nothing to do with the operation of the machines, but merely record the result after the machine is played in the same manner as a totalizer

arrives at the results of the pari-mutuel betting at a horse race.

3. The machines are not gambling devices per se, for the following reasons:

(A) The machines can be used for amusement and recreational purposes.

(B) No coin can be inserted to operate the machines.

(C) There is no direct "pay-off" from the machines.

We, therefore, submit that the two Electronic Pointmakers herein are not within the prohibitive scope of the statute, and that the Libel of Information should be dismissed.

Respectfully submitted,

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